84-912

Office - Supreme Court, U.S.
FILED
NOV 17 1984
ALEXANDER L. STEVAS.
CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

Leroy Moore, et ux,

Plaintiff-Appellant

V.

Southwestern Electric Power Company

Defendant-Appellee

On Appeal from the United States District Court
Eastern District of Texas
Marshall Division

PETITION FOR WRIT OF CERTIORARI

ERSKINE, SMITH & McMAHON
P. O. Box 3485
Longview, Texas 75606
(214) 757-8435

Attorneys for Appellants

32pp

QUESTIONS PRESENTED

Did the Court, in its opinion, improperly hold that the employer was entitled to indemnity for its own negligence as a result of the settlement agreement with the Appellees?

Did the Court, in its opinion, improperly conclude "that the Texas Legislature intended to make an exception to this general principle (i.e. disfavoring indemnity for one's own negligence) for cases arising under TEX.REV.CIV. STAT.ANN. Art. 1436c"?

Did the Court, in its opinion, improperly construe TEX.REV.CIV.STAT.ANN. Art. 1436c(7) (b) in concluding that the employer was required to idemnify SWEPCO for "all liability"?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... (i)
TABLE OF CONTENTS ..... (ii)
TABLE OF AUTHORITIES ..... (iii)
OPINIONS BELOW 1
JURISDICTIONAL GROUNDS IN THIS COURT 2
CONSTITUTIONAL AND STATUTORY PROVISIONS 2
STATEMENT OF THE CASE 3
EXISTENCE OF JURISDICTION BELOW 4
ARGUMENT 4
CONCLUSION 7
CERTIFICATE OF SERVICE 8
APPENDIX A
Opinions Below A-1
APPENDIX B
Related Decisions Below B-1
APPENDIX C
Notice of Appeal C-1

TABLE OF AUTHORITIES

Cases **Page**

B&B Auto Supply vs. Central Freight Lines, Inc.,
603 SW2d 814, 816-817 (Tex. 1980) 5

Duncan vs. Cessna Aircraft Co.,
665 SW2d 414 (Tex. 1984) 5

Eastman Kodak Co. vs. Exxon Corp.,
603 SW2d 208 (Tex. 1980) 4

Houston Lighting & Power Co. vs. Brooks,
336 SW2d 603 (Tex. 1960) 6

Statutes

TEX.REV.CIV.STAT.ANN. Art. 1436c 3,4,6,7
TEX.REV.CIV.STAT.ANN. Art. 1436c (7) (b) 2, 6
TEX.REV.CIV.STAT.ANN. Art. 8306, Sec. 3 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

Leroy Moore, et ux,

Plaintiff-Appellant

VS.

Southwestern Electric Power Company,

Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI
WRONGFUL DEATH ACTION

OPINION BELOW

The opinion of the Court of Appeals for the 5th Circuit will be reported at _____ F2d _____ (1984).

JURISDICTION

The opinion of the Court of Appeals for the 5th Circuit was made and entered on July 30, 1984, and a copy thereof is appended to this petition in the Appendix and labeled as Appendix "A". The Motion for Rehearing was denied on August 28, 1984. The jurisdiction of this Court is invoked under 28 USC 1254.

STATUTES INVOLVED

TEX.REV.CIV.STAT.ANN. Art. 1436c(6)&(7) reads as follows:

"Section 6. When any person, firm, or corporation desires to temporarily carry on any function, activity, work, or operation in closer proximity to any high voltage overhead line than permitted by this Act, the person or persons responsible for the work to be done shall promptly notify the operator of the high voltage line. The work shall be performed only after satisfactory mutual arrangements have been negotiated between the owner or the operator of the lines or both and the person or persons responsible for the work to be done for temporary mechanical barriers separating and preventing contact between material, equipment, or persons and high voltage electric lines, temporary de-energization and grounding, or temporary relocation or raising of the lines. The actual expense incurred by any operator of high voltage lines in providing clearances as above set out shall be paid by the person or persons responsible for the work to be done in the vicinity thereof and the operator of the lines may require such payment in advance, such operator being without obligation to provide such clearance until such payment shall have been made. Should the actual expense be less than the payment made the difference shall be refunded. The operator of the lines shall be given not less than 48 hours advance notice to arrange for such temporary clearances.

Section 7. (a) Every person, firm, corporation, or association and every agent or employee of such person, firm, corporation, or association who violates any of the provisions of this Act shall be fined not less than $100, nor more than $1,000 or confined in jail for not more than one year or both.

(b) If a violation of this Act results in physical or electrical contact with any high voltage overhead line, the person, firm, corporation, or association violating the provisions of this Act shall be liable to the owner or operator of such high voltage line for all damage to such facilities and for all liability incurred by such owner or operator as a result of any such contact."

STATEMENT OF THE CASE

While working on premises owned by Valmac, Leroy Moore, Jr. touched a truck bed or chain that had been energized through contact with a SWEPCO electrical line. Leroy Moore, Jr. died as a result of his injuries. Valmac denied that Leroy Moore, Jr. was an employee, but subsequently agreed to compromise and settle the worker's compensation claim brought by Leroy Moore, Jr.'s survivors. A routine settlement agreement containing an indemnification and "hold harmless" provision was executed as a part of this worker's compensation settlement.

Plaintiffs in this suit are Leroy Moore, Sr. and wife, Josephine Moore, parents of Leroy Moore, Jr. They sued SWEPCO for negligence. SWEPCO filed a third-party action joining Valmac and alleging that Valmac had violated TEX.REV.CIV.STAT.ANN. Art. 1436c by failing to notify SWEPCO that work would be performed near one of its lines.

The trial court found, as a matter of law, that Valmac had violated Article 1436c and submitted the question of SWEPCO's negligence and apportionment of fault between the parties to a jury. The jury found that SWEPCO was negligent and apportioned fault 40% to SWEPCO and 60% to Valmac. The jury also awarded damages totaling $420,000.00.

The trial Judge reduced the total verdict by Valmac's percentage fault, and rendered judgment against SWEPCO for 40% of the verdict. SWEPCO perfected its appeal, and following oral argument, a majority of the panel reversed the trial court and rendered the judgment for SWEPCO.

Circuit Judge Jerre Williams, joined by Circuit Judge Randall, held that TEX.REV.CIV.STAT.ANN. Art. 1436c entitled

SWEPCO to indemnity for the 40% fault attributed to its own negligence.

A motion for panel rehearing was filed, and such motion was denied.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Eastern District of Texas, Marshall Division, had jurisdiction over this suit under 28 USC 1291.

ARGUMENT

The decision below should be reviewed because it erroneously interprets TEX.REV.CIV.STAT.ANN. Art. 1436c (7) (b) so as to conflict with the clear public policy of the State of Texas disfavoring indemnity for a party's own negligence and with the expressed interest of the statute to promote safety by requiring employers and utilities to meet certain minimum safety standards. Additionally, the decision below should be reviewed because the construction of TEX.REV.CIV.STAT.ANN. Art. 1436c made by a majority of the panel will preclude a significant number of injured workers or survivors of deceased workers from pursuing a third-party action against a utility after settling the worker's compensation claim.

(1) The Fifth Circuit, in its opinion, improperly held that the Appellant was entitled to indemnity for its own negligence as a result of the settlement agreement with the employer.

The Supreme Court of Texas spoke to this issue in *Eastman Kodak Co. vs. Exxon Corp.*, 603 SW2d 208 (Tex. 1980). The Court in *Eastman* said, "Over the last three decades, the trend of Texas case law has been progressively stricter in applying the rule that a contract of indemnity will not protect an indemnitee against his own negligence unless the obligation of the indemnitor to do so is expressed in clear unequivocal terms."

The Court went even further in quoting prior opinions and stated that Texas has progressed toward an "express

negligence" rule. That is, a rule that requires the indemnitor to state in the contract that it intends to hold the indemnitee harmless from his own negligence.

Such a direction by the Supreme Court of Texas when coupled with the continual movement of that Court away from concepts of total loss or total victory, and the strong public policy of Texas as stated in the Workers' Compensation Statute concerning the rights of workers, make it clear that the Supreme Court of Texas would not find favor with the majority opinion of the Fifth Circuit.

B & B Auto Supply vs. Central Freight Lines, Inc., 603 SW2d 814 (Tex. 1980) following on the heels of *Eastman* threw the right of common law indemnity out of the judicial window in Texas. The Court, in rejecting total loss/total victory concepts such as indemnity said, "Application of the doctrine of indemnity results in shifting the entire burden of loss from one tortfeasor to another." at p.816. "Since the enactment of Art. 2212a we have sought to abolish doctrines directed to the old choice of total victory and total defeat." at p. 816-817. "The common law doctrine of indemnity is yet another of these common law rules which results in shifting total responsibility for a tort from one party to another." at p. 817.

Consistent with the continuing trend of the Supreme Court of Texas away from total victory/total loss concepts is *Duncan vs. Cessna Aircraft Co.*, 665 SW2d 414 (Tex. 1984). The Court, in expanding their rejection of total victory/total loss to the area of strict products liability, stated, "An ideal tort system should impose responsibility on the parties according to their abilities to prevent the harm." at p. 425. Speaking of "all or nothing" concepts as applied in products liability, the Court said such concepts "are **outmoded** and **undesirable** doctrinal **throwbacks** resulting in unfairness to plaintiffs, to defendants." at p. 424-425.

Considering the mood and direction of the Supreme Court of Texas, as stated in the above cited cases together with the following quote from the Texas Workers' Compensation Statute, TEX.REV.CIV.STAT.ANN. Art. 8306 sec. 3, "No part of this Section is intended to lessen or alter the

employees existing rights or cause of action either against his employer, its subscriber, or any third party," it is clear that if the Supreme Court of Texas had the opportunity to review this case, they would reject the opinion of the majority and adopt the view of Judge Tate.

(2) The Court, in its opinion, improperly concluded, "that the Texas legislature intended to make an exception to this general principle (i.e., disfavoring indemnity for one's own negligence) for cases arising under Article 1436c."

Houston Lighting & Power Co. vs. Brooks, 336 SW2d 603 (Tex. 1960) relied upon by the majority stated that, with regard to the Public Utilities Act, the intent of the Legislature was to protect workers in the State of Texas by "assuring that employers will follow minimum statutory requirements while performing work near hazardous high voltage lines."

If safety of the worker is the intent of the Public Utilities Act, it is logically inconsistent to infer that the purpose and intent of the Act was to overturn a well established common law rule which also is to promote responsibility, and thereby promote safety.

Appellees would respectfully submit that there is nothing in any statute or case cited by the majority that indicates an intent to make an exception to the rule disfavoring indemnity for one's own negligence. Further, as stated by Judge Tate, "nor can any functional or policy reason be ascribed for its so doing."

(3) The Court, in its opinion, improperly construed Sec. 7(b) of Article 1436c in concluding that the employer was required to indemnify SWEPCO for "all liability."

Appellees rely on the cases previously cited in their briefs and this petition to show that the majority opinion violated the intent of the Public Utilities Act and the Workers' Compensation Statute of the State of Texas, that intent being the safety of workers, and further violated the well established common law rule that a negligent party is barred from receiving indemnity for its own negligence. In addition, Ap-

pellees would show the effect of the majority opinion is to grant blanket immunity to a utility if an employer violates relevant portions of Art. 1436c without regard to what the utility actually knew about a dangerous activity. In other words, in this case SWEPCO was aware of the proposed activities that took the life of Leroy Moore, Jr. Although it may not have been aware of the exact activity at the precise moment that it occurred, according to the majority opinion, it was immaterial what SWEPCO actually knew so long as Valmac did not strictly comply with Art. 1436c.

With the reasoning of the majority, would it have made a difference if the District Superintendent of SWEPCO had been on the scene and personally witnessed the dangerous activity in process? Apparently it would not have made a difference because Valmac violated Art. 1436c. Such reasoning does nothing to encourage safety but merely excuses negligent conduct for no apparent reason. Such reasoning violates the obvious intent of Art. 1436c, that being to notify the utility of a dangerous activity about which it would not otherwise be aware.

CONCLUSION

The opinion of this Court, as expressed by the majority, will have far reaching effect. There are hundreds of people killed or injured yearly in Texas as a result of coming in contact with high voltage lines. A significant number of such persons or their survivors will execute settlement agreements with their employers. The wording of such agreements will be the same or similar to that contained in the agreement signed by the Appellees. According to the majority opinion of this Court, most, if not all, of those people will be cut-off without remedy against any negligent utility. Such a result flies in the face of the intent expressed by the Public Utilities Act and the Workers' Compensation Statute of Texas. It is also apparent that the opinion is in conflict with the common law rule against indemnity for one's own negligence, and given the trend of the Supreme Court of Texas, it would be in conflict with that Court if and when that Court renders a decision based on similar facts.

For all the reasons set forth above and because no one can seriously contend that Mr. and Mrs. Leroy Moore actually in-

tended to release SWEPCO by settling their workers' compensation claim, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ERSKINE, SMITH & McMAHON
P.O. Box 3485
Longview, Texas 75606
(214) 757-8435

By _____
Mike Smith, Bar No. 18630500

By _____
Mark P. McMahon, Bar No. 13776500

Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been furnished to Mr. Herbert Boyland, P. O. Box 312, Longview, Texas 75606, on the 3 day of December, 1984.

_____

APPENDIX

Appendix A

Opinion of the United States Court of Appeals for the Fifth Circuit

Leroy MOORE, Sr. and Wife Josephine Moore, Plaintiffs-Appellees,

v.

SOUTHWESTERN ELECTRIC POWER COMPANY, Defendant-Third-Party Plaintiff-Appellant,

v.

VALMAC INDUSTRIES, INC., Third-Party Defendant, Appellee.

No. 83-2266.

United States Court of Appeals, Fifth Circuit.

July 30, 1984

Employee's parents brought action against power utility to recover damages arising out of death of their son by electrocution. From judgment of the United States District Court for the Eastern District of Texas at Marshall, Robert M. Parker, J., utility appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) employer who violated Texas Public Utilities Act by permitting employee to perform activity within six feet of high-voltage overhead line was required to provide full indemnification to utility for any claims arising out of the violation, including liability for utility's own negligence, and (2) since employee's parents' settlement with employer provided that they would idemnify employer from any further claims arising out of the employee's death, and the Texas Act in turn imposed liability

upon employer to indemnify utility for claims arising out of employer's violation thereof, parents were entitled to no recovery from utility, under Texas law.

Reversed and rendered.

Tate, Circuit Judge, dissented and filed opinion.

1. Indemnity — 13.1(2)

Employer who violated Texas Public Utilities Act by permitting employee to perform activity within six feet of high-voltage overhead line was required to provide full indemnification to utility for any claims arising out of the violation, including liability for utility's own negligence, which was within ambit of statutory "all liability incurred" language. V.A.T.S.Bus.Corp.Act, art. 1436c, § 7(b).

2. Indemnity — 12

Since employee's survivors' settlement with employer provided that they would indemnify employer from any further claims arising out of employee's death, and Texas Public Utilities Act in turn imposed liability upon employer to indemnify utility for claims arising out of employer's violation of the Act, the circuitous series of indemnification obligations precluded survivors, under Texas law, from recovering anything from utility. V.A.T.S.Bus.Corp.Act, art. 1436c, § 7(b).

Appeal from the United States District Court for the Eastern District of Texas.

Before RANDALL, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

In this Texas diversity action, Josephine and Leroy Moore, Sr. sought damages from Southwestern Power Company (SWEPCO) for personal injuries arising out of the death of plaintiffs' son, Leroy Moore, Jr. Moore was fatally injured when he touched a live haul truck that had become electrical-

ly charged from contact with an electric power line owned by SWEPCO. ON submission by special interrogatories, the jury found SWEPCO 40% negligent.

The district court denied SWEPCO's motion for judgment *non obstante veredicto*. Concluding that plaintiff's claim was extinguished due to a series of indemnity agreements, we reverse and render a judgment in favor of defendants.

I. Facts

The facts in this case are undisputed. The accident in question occurred on July 10, 1979. At the time of the accident, Leroy Moore, Jr., a 17 year old young man, was working for Valmac Industries, a chicken processing company in Tenaha, Texas. While loading chickens on a truck from a chicken house on Valmac's premises, Moore was electrocuted when the truck he was working on became energized by contact with a SWEPCO power line.

Josephine and Leroy Moore, Sr., parents of the decedent, brought a workers' compensation claim against Valmac. Valmac denied that Moore was an employee of Valmac at the time of the accident, contending instead that Moore was an independent contractor. Nevertheless, United States Fidelity and Guaranty Company, Valmac's workers' compensation insurer, entered into a Compromise Settlement Agreement with plaintiffs for $16,250. In return, plaintiffs signed an agreement releasing Valmac and its insurer from any claims to which plaintiffs might be entitled by reason of their son's death. Plaintiffs further agreed to indemnify defendants and hold them harmless from any further claims growing out of the occurrence.

The Moores then brought this action against SWEPCO, under the Texas Wrongful Death Act, Tex.Rev.Civ.Stat.Ann. art. 4671 et seq. (Vernon 1952), seeking damages for the death of their son. SWEPCO, in turn, filed a third-party action against Valmac, claiming that Valmac had violated the Public Utilities Act, Tex. Rev. Civ. Stat. Ann. art. 1436c (Vernon 1980), by allowing its employee to come within six feet of high voltage power lines, and that as a result of this violation,

Valmac was required to indemnify SWEPCO under §7(b) of the statute for any damages arising from Moore's death.

Valmac claimed immunity from further liability. The company contended that Article 1436c, § 7(b) did not require indemnification on these facts. Valmac also claimed immunity based on the compromise and settlement agreement with the Moores, and sought judgment as counter-plaintiff against the Moores for any damages that Valmac might incur in the action. The trial court held that Valmac was a tortfeasor as a matter of law due to its violation of Article 1436c, and dismissed Valmac from the suit.

After the evidence was presented, SWEPCO made a motion for directed verdict. SWEPCO first argued that there was insufficient evidence presented for a jury reasonably to find negligence or proximate cause. Second, and of prime significance in this case, SWEPCO argued that even if the evidence *was* sufficient to find negligence, a directed verdict in its favor was proper because plaintiffs' action had been extinguished through a circuitous series of indemnification obligations. The pattern of indemnification argued by SWEPCO is as follows: (1) SWEPCO was entitled to indemnification from Valmac based on Valmac's violation of Article 1436c, as discussed above; (2) Valmac, in turn, was entitled to indemnification from the Moores under the contractual provisions of their settlement and release agreement with Valmac. Thus, SWEPCO ultimately would recover from Valmac any payments made to plaintiffs, and plaintiffs ultimately would reimburse Valmac for any payments made by Valmac to SWEPCO. Since the net result for plaintiffs would be zero recovery, SWEPCO argued that plaintiffs simply should be denied recovery from defendants at the outset as a matter of law.

The trial court denied SWEPCO's motion and submitted the case to the jury. In answer to special interrogatories, the jury found that both SWEPCO and Valmac were negligent. It determined that SWEPCO's negligence was 40% and a proximate cause of the accident, and that Valmac's was 60% and a proximate cause. The jury assessed damages at $300,000 for Leroy Moore's conscious pain and suffering and $120,000

for the Moore's loss of their son. The district court entered a judgment awarding plaintiffs $168,000 — forty percent of $420,000.

SWEPCO appeals, based on the two arguments mentioned above, and on the additional ground that the jury award of $300,000 for conscious pain and suffering was excessive.

After reviewing relevant Texas law, we agree with SWEPCO's argument that plaintiffs' claim was extinguished by virtue of the two indemnification obligations. As a result, the trial court should not have submitted the question of SWEPCO'S liability to the jury, but instead should have granted the defendant's motion for an instructed verdict or alternatively, for judgment *non obstante veredicto*. Because of this conclusion, we do not address the alternative arguments presented by SWEPCO on appeal.

II. INDEMNITY

A. *Article 1436c — Indemnification of SWEPCO by Valmac*

[1] SWEPCO contends that it is entitled to full indemnification by Valmac for any claims arising out of Moore's death because Valmac violated section 1436c of the Public Utilities Act, Tex.Rev.Civ.Stat.Ann. art. 1436c (Vernon 1980). Article 1436c sets forth the statutory duty of an employer performing any activity within six feet of a high voltage overhead line. The relevant portions of Article 1436c provide:

> Sec. 3. Unless danger against contact with high voltage overhead lines has been effectively guarded against pursuant to the provisions of Section 6 of this Act, no ... firm, corporation, or association shall ... perform any function or activity upon any land ... or other premises if at any time during the performance of any function or activity, it is possible that the person performing the function or activity shall move or be placed within six feet of any high voltage overhead line or if it is possible for any part of any tool, equipment, machinery, or material used by such person to be brought within six feet of any high voltage overhead line during the performance of any such function or activity.

> Sec. 4. Unless danger against contact with high voltage overhead lines has been effectively guarded against pursuant to the provision of Section 6 of this Act, no ... firm, corporation, or association shall ... operate, move, transport, handle ... any tool, machinery, equipment, supplies, materials ... or any part thereof within six feet of any high voltage overhead line.
>
> Sec. 6. When any ... firm, or corporation desires to temporarily carry on any function, activity, work, or operation in closer proximity to any high voltage overhead line than permitted by this Act, the person or persons responsible for the work to be done shall promptly notify the operator of the high voltage line. The work shall be performed only after satisfactory mutual arrangements have been negotiated between the owner or the operator of the lines or both and the person or persons responsible for the work to be done for temporary mechanical barriers separating and preventing contact between material, equipment, or persons and high voltage electric lines, temporary deenergization and grounding, or temporary relocation or raising of the lines. The actual expense incurred by any operator of high voltage lines in providing clearances as above set out shall be paid by the person or persons responsible for the work to be done in the vicinity thereof and the operator of the lines may require such payment in advance, such operator being without obligation to provide such clearance until such payment shall have been made.... The operator of the lines shall be given not less than 48 hours' advance notice to arrange for such temporary clearances.

The trial court ruled as a matter of law that Valmac had violated Article 1436c.[1] Section 7(b) of Article 1436c states the consequences of such a violation:

---

[1]. The court did not specify which provision of Article 1436c was violated by Valmac. The court instructed the jury that Valmac violated Article 1436c because the company was one of the entities responsible for work conducted within the six foot and ten foot provisions of the statute, and because it was undisputed that Valmac equipment touched the power line.

> If a violation of this Act results in physical or electrical contact with any voltage overhead line, the ...*firm, corporation, or association violating the provisions of this Act shall be liable to the owner or operator of such high voltage line for* all damages to such facilities and for *all liability incurred by such owner or operator as a result of any such contact.* (Emphasis added.)

SWEPCO takes the position that pursuant to § 7(b), Valmac is required to idemnify SWEPCO for "all liability" incurred, including any liability incurred as a result of SWEPCO's own negligence.

In response, Valmac argues that § 7(b) was not intended to indemnify a utility for its *own* negligence, but only for liability which could be attributed to a third party's violation of the statute. Further, Valmac argues that under the Workers' Compensation Act, Tex.Rev.Civ.Stat.Ann. art. 8306, § 3 (Vernon 1967), a negligent third party is barred from seeking contribution or indemnity from an employer who has previously made full payment pursuant to the workers' compensation laws. *See Grove Manufacturing Co. v. Cardinal Construction Co.*, 534 S.W. 2d 153 (Tex.Civ.App.—Houston, 1976, writ ref'd n.r.e.). Valmac further urges the general proposition that the courts of Texas disfavor interpretations allowing indemnification for a party's own negligence, *see e.g., Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208 (Tex.1980), and that Article 1436c is in abrogation of common law and should be interpreted strictly. *See Ringo v. Gulf States Utilities Co.*, 569 S.W.2d 31, 34 (Tex.Civ.App.—Beaumont 1978, writ ref'd n.r.e.).

Faced with these statutory conflicts, our first task is to determine whether by employment of the expression "all liability incurred" in § 7(b), the Texas Legislature intended that an entity violating Article 1436c would indemnify the power company solely for the liability incurred by the violator's negligence, or whether alternatively, indemnification by the violator was intended to encompass liability resulting from the power company's own negligence, as well. The parties do not contest the fact that Texas law applies in this case. "In a case where state substantive law governs,

this Court is obliged to apply the law of that state as interpreted by its highest court." *Scarborough v. Northern Assurance Co. of America v. Columbia Casualty Co.*, 718 F.2d 130, 136 (5th Cir.1983).

Although we find no Texas Supreme Court decisions dealing with § 7(b) or any other provision of Article 1436c, an intermediate appellate court in Texas has interpreted and applied the statute on closely analogous facts. In *Houston Lighting & Power Co. v. Eller Outdoor Advertising Co. of Texas*, 635 S.W.2d 133 (Tex.App.—Houston 1982, writ ref'd n.r.e.), Tommy Miller, an employee of Eller Outdoor Advertising, was electrocuted when he came into contact with a power line owned and operated by Houston Lighting & Power Company (HL & P). Just as in the present case, Miller's family recovered workers' compensation benefits from the employer. Subsequently, the family filed a wrongful death action against HL & P, which was settled.[2] HL & P then brought an indemnification suit against Eller for the amount of the settlement. The trial court entered judgment for Eller, holding that the Workers' Compensation Act precluded HL & P's suit for indemnification, since Article 8306, § 3 specifically provides that a subscriber to workers' compensation insurance has no liability to reimburse or hold harmless a nonsubscribing third party tortfeasor. Tex.Rev.Civ.Stat.Ann. art. 8306, § 3 (Vernon 1967).

The Court of Civil Appeals reversed, and held that in an action arising from a breach of an employer's statutory duty under Article 1436c of the Public Utilities Act, a power company held liable in a third party action *was* entitled to indemnification from the employer. The court reached this decision

---

[2] *Eller* is factually distinguishable from the present case in that the plaintiffs in *Eller* settled their suit with the power company while the plaintiffs in the present case proceeded to trial and secured a judgment against the power company. For purposes of the issue involved in this case, however, there is no relevant legal distinction between a settlement and a judgment.

by reasoning that such an action was not "on account of"[3] injury or death of the employee, but arose instead from the employer's breach of the Public Utilities Act. The court concluded that the Public Utilities Act would be rendered meaningless if the Workers' Compensation Act barred indemnity, since "the clear intent of the legislature was to hold an employer liable for violations of the Public Utilities Act". *Houston Lighting & Power Co. v Eller Outdoor Advertising Company of Texas, supra*, 635 S.W.2d at 135 (Tex.App.—Houston 1982, writ ref'd n.r.e.).

The effect of an Article 1436c violation was also discussed in *Tull v San Patricio Electric Cooperative, Inc.*, 564 S.W.2d 192 (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e.). In this case, a self-employed plaintiff brought an action against the electric cooperative for injuries sustained from an electric shock received when the crane that plaintiff was operating came in close proximity to an overhead high-voltage line.[4] The Court of Civil Appeals affirmed a directed verdict in favor of defendant. The court held, inter alia, that the injuries sustained by Tull resulted from his own violation of Article 1436c, and since Tull did not meet the burden of proving that he had taken adequate safety precautions, he could not "escape the consequences of [his] violation." *Id.* at 195. In footnote, the court cited § 7(b) of the statute, implying that the consequence of violating Article 1436c was responsibility

---

[3] Article 8306, § states that:

If an action for damages *on account of* ...death of an employee of a subscriber is brought by ... the representatives of such deceased employee ... and ... results in a judgment ... the subscriber ... shall have no liability to reimburse ... such other person ... Tex.Rev.Civ.Stat.Ann. art. 8306, § 3 (Vernon 1967) (emphasis added).

[4]. Tull received an electric shock despite the fact that his crane never actually came into contact with the power line; the shock resulted when a rig cable on the crane drew an arc of electricity from the line.

for all liability incurred,[5] and thus preclusion from recovery against the power company.[6]

While it is true that Texas courts will not generally interpret statutes or contracts to permit indemnification for a party's own negligence, the above cases indicate that the only courts that have spoken on the issue in Texas find that the Texas Legislature intended to make an exception to this general principle for cases arising under Article 1436c. Absent clear indication that the Supreme Court of Texas would decide this issue differently, the decisions of these intermediate courts are controlling. *Mott v. Mitsubishi*, 636 F.2d 1073, 1074 (5th Cir.1981).[7]

B. Settlement — Indemnification of Valmac by Plaintiffs

[2] We have determined that under Article 1436c § 7(b), Valmac must indemnify SWEPCO for whatever amount SWEPCO is required to pay plaintiffs. We next examine the agreement between plaintiffs and Valmac. The relevant

---

[5]. It is significant that the plaintiff in *Tull* was self-employed. A mere employee who violates Article 1436c is *not* responsible for all liability incurred, and is not precluded from recovery against the power company. *Sun Oil Company v. Massey*, 594 S.W.2d 125, 131 (Tex.Civ.App.—Houston 1979, writ ref'd n.r.e.). This is true because an employee typically has no authority to negotiate with the power company or bind his employer to an agreement to pay for any necessary precautionary measures. *Ringo v. Gulf States Utilities Company*, 569 S.W.2d 31, 34 (Tex.Civ.App.—Beaumont 1978, writ ref'd n.r.e.).

[6]. The court also based its affirmance of the directed verdict on a conclusion that the power company had no duty to warn of danger on these facts, and that Tull's negligence was more than 51% of the total operative negligence.

[7]. We cannot certify this question of Texas law by the Supreme Court of Texas to obtain the definitive resolution of this issue. The Texas court has held it does not have the authority under the Texas Constitution to answer such certified questions. *United States Life Insurance Company v. Delaney*, 396 S.W.2d 855 (Tex.1965). The Supreme Court of the other two states in the Fifth Circuit, Louisiana and Mississippi, do receive such certifications. *See Humphrey v. C.G. Jung Educational Center of Houston*, 714 F.2d 477, 478 n 1 (5th Cir.1983).

BEST AVAILABLE COPY

clause in the workers' compensation settlement agreement states:

> NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That We, Leroy Moore, Sr. and wife, Josephine Moore, in consideration of the sum of SIXTEEN THOUSAND TWO HUNDRED FIFTY AND NO/100 ($16,250.00) DOLLARS, ... do hereby RELEASE, DISCHARGE and FOREVER ACQUIT Valmac Industries, Inc. and United States Fidelity and Guaranty Company from any and all claims to which the undersigned may be entitled by reason of the death of their son, Leroy Moore, Jr., ... hereby agreeing to indemnify and hold harmless Valmac Industries, Inc. and United States Fidelity and Guaranty Company from any further claim, demand, or cause of action whatsoever, whether herein mentioned or not, growing out of or in any way resulting or to result from the aforementioned occurrence forming the basis of this claim.

Plaintiffs do not dispute that pursuant to this settlement, they are obligated to indemnify Valmac from any further claims resulting for Leroy Moore, Jr.'s death. Nor could they. The settlement agreement clearly indicates that indemnification is required by plaintiff.

In summary, plaintiffs are entitled to recover $168,000 from defendant SWEPCO, and SWEPCO is entitled to recover $168,000 from Valmac. Valmac, in turn under the settlement agreement, is entitled to recover from plaintiffs. Plaintiffs, therefore, under their own settlement agreement with Valmac are not entitled to any recovery. When such circular patterns of indemnity develop, Texas courts resolve the matter by denying recovery to plaintiffs. In *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779 (Tex.Civ.App.—Amarillo 1952, writ ref'd n.r.e.), for example, the Texas Court of Civil Appeals dealt with circular indemnification by denying recovery. In that case, the court determined that a separate settlement in a negligence action was in effect a release and indemnification agreement by plaintiffs of two defendants and their insurer. When the court additionally determined that these defendants were required to indemnify a third defendant, the court concluded that the third defendant could plead the first

settlement as a release in defense to plaintiff's suit against him.

A plaintiff's claim was similarly eliminated by a series of indemnity agreements in *Phillips Pipe Line Company v. McKown*, 580 S.W.2d 435 (Tex.Civ.App.—Tyler 1979, writ ref'd n.r.e.) In this case, an independent contractor agreed to indemnify a pipeline owner from any claims by third parties for damages from construction of the pipeline. Subsequently, various landowners brought suit against the independent contractor, claiming that the pipeline construction injured their land. Plaintiff landowners ultimately settled with the independent contractor and agreed to indemnify the contractor from any claims the pipeline owner might have against it. When the landowners then brought an action against the pipeline owner, their action was dismissed. The court of appeals held that by releasing the independent contractor, plaintiffs effectively had released the pipeline owner as well, based on the contractor's duty to indemnify the pipeline owner. This result was reached because it was "obvious that it could not have been the intention of the parties to the settlement agreement that [the independent contractor], in order to recover the loss from a judgment based on its indemnity provision if sued by [the pipeline owner] on the contract, would then be entitled to turn around and sue [plaintiff] in a circuitous action." *Id.* at 440.

Since the Moores effectively extinguished their claim against SWEPCO by settling with and agreeing to indemnify Valmac, the district court erred in submitting SWEPCO's negligence to the jury and properly should have ruled in SWEPCO's favor as a matter of law. This conclusion eliminates any need to discuss the issue of damages. There is no damage liability.

REVERSED AND RENDERED.

TATE, Circuit Judge, dissenting:

I respectfully dissent.

The effect of the majority opinion is to hold that a Texas employee, by settling his Texas Workers' Compensation

claim against his employer, likewise extinguishes any tort cause of action he may have against an electrical utility for his wrongful death or injury caused by a high voltage electrical line. The basis for the majority's holding is a section of the Texas Public Utilities Act that entitled the utility to indemnification from the employer for permitting the deceased employee to work in proximity to ineffectively guarded high-voltage electrical lines, and its purported result in combination with compensation settlement (including a routine hold harmless indemnification) executed by the decedent's survivors with his employer.

With deference for the views of the majority, the resulted reached, although not illogical, flouts the intent of both public utility and worker-compensation statutes to provide, through economic disincentive, protection of workers injured at work by reasons of hazards posed by high-voltage electrical lines.

The majority relies upon *Houston Lighting & Power Co. v Eller Outdoor Advertising Co. of Texas*, 635 S.W.2d 133 (Tex.App.1982), writ ref'd n.r.e., a decision I find distinguishable and inapposite. This decision concerned a suit by a utility against an employer to be indemnified, by reason of the Public Utility Act, for the tort recovery against it on behalf of the worker's survivors. There, the Texas intermediate court held that a provision of the Texas Workers' Compensation Act — that protected the employer against indemnification of third persons for their tort liability to an employee — did not bar this suit by the utility. The reasoning of the court was that the clear intent of the subsequently enacted Public Utilities Act provision "was to hold an *employer* liable for violations of the Public Utilities Act" and that this construction was "most consistent in *protecting* workers in this state, and in assuring that employers will follow minimum statutory requirements while performing work near hazardous high voltage lines." 635 S.W.2d at 135 (emphasis added).

Contrary to this legislative intent, the majority holds that, by the settlement with the employer of an electrocuted employee's workers' compensation claim, both the public utility and the employer are immunized from liability for

their joint negligence (in the utility creating a high-voltage hazard and in the employer permitting its workers to work near an ineffectively guarded high-voltage line). Dissenting, I would hold, in view of this statutory construction and these statutory purposes, that the Public Utilities Act conferred upon the utility a statutory right to indemnification from the employer for high-voltage hazards permitted by the employer, but that—especially in view of the strong Texas public policy disfavoring indemnity for a party's own negligence, see e.g., *Eastman Kodak Company v. Exxon Corporation, 603 S.W.2d 208 (Tex. 1980)*[1] — the worker-survivors' compensation settlement and agreement to indemnify the employer against other claims cannot be construed as constituting an agreement by the employee's survivors to indemnify the employer for claims brought against it for its own negligence *per se* by statutory violation (of a provision designed to protect the employee) of the Texas Public Utility Act.

I respectfully dissent.

---

[1]. Unlike the majority, I am unable to find either from the Public Utility Act or from the two or three Texas intermediate decisions relied upon by the majority, any legislative intent that the Act intended to make an exception to this general principle. Nor can any functional or policy reason be ascribed for its so doing.

Appendix B

In the United States District Court

For the Eastern District of Texas

Marshall Division

Leroy MOORE, Sr., et ux

V.

SOUTHWESTERN ELECTRIC
POWER COMPANY

M-81-80-CA

JUDGMENT

This action came on for trial before the Court and a jury. On October 21, 1982, the jury rendered its verdict, finding damages in the amount of $300,000.00 for the estate of the deceased, and $120,000.00 for the parents of the deceased. The jury found no negligence on the part of the deceased that contributed to proximately cause the accident in question, negligence on the part of Valmac Industries, Inc., the deceased's employer, that contributed 60% to proximately cause the accident, and negligence on the part of SWEPCO that contributed 40% to proximately cause the accident.

On November 5, 1982, the Court entered Judgment in favor of the Plaintiffs for $420,000.00. On November 1, 1982, the defendant SWEPCO filed a Motion for Judgment Notwithstanding Jury Verdict or Alternatively for New Trial. On November 9, 1983, the Plaintiff filed a First Amended Motion for Judgment, asking for judgment against SWEPCO in the amount of $400,000.00 or in the alternative in the amount of $170,283.25. On November 12, 1982, the Defendant SWEPCO filed a Motion for Judgment Notwithstanding Jury Verdict or

Alternatively Motion for New Trial that was identical to the one it filed on November 1. The Court took the Motion for Judgment Notwithstanding Jury Verdict or Alternatively for New Trial under advisement, and on April 6, 1983 denied the motion. Likewise on April 6, the Court entered Judgment for the Plaintiffs, Leroy Moore, Sr. and wife, Josephine Moore, in the amount of $170,283.25.

Valmac has filed a Motion for Entry of Judgment Nunc Pro Tunc. Additionally, SWEPCO has inquired of the Court the meaning of its Judgment of April 6, 1983, in light of its inconsistent Judgment of November 5, 1982. To clear up any confusion, the Court hereby VACATES both prior Judgments and enters the following JUDGMENT:

Leroy Moore, Sr., and wife, Josephine Moore, parents of the deceased, shall recover from the Defendant SWEPCO the sum of $48,000.00, representing 40% of the damages assessed in their favor. The estate of the deceased, Leroy Moore, Jr. shall recover from the Defendant SWEPCO the sum of $120,000.00, representing 40% of the damages assessed in its favor. Interest shall run on both amounts at the legal rate of 8.98% per annum from date of this Judgment. SWEPCO as Third-party Plaintiff shall take nothing from Valmac Industries, Inc. as Third-party Defendant. Costs of all parties are assessed against SWEPCO.

SIGNED and ENTERED this 2nd day of May, 1983.

Signed:
Robert M. Parker
United States District Judge

Filed: May 2, 1983
U.S. District Court
Eastern District of Texas

Appendix C

In the United States District Court
For the Eastern District of Texas
Marshall Division

Leroy MOORE, SR., ET UX

VS.

SOUTHWESTERN ELECTRIC
POWER COMPANY

M-81-80-CA

NOTICE OF APPEAL

Notice is hereby given that Southwestern Electric Power Company hereby appeals to the United States Court of Appeals for the Fifth Circuit from the judgment signed and entered November 1, 1982, the order signed April 6, 1983 overruling Southwestern Electric Power Company's motion for judgment notwithstanding the verdict and in the alternative for new trial, the judgment dated April 6, 1983, and the judgment dated May 2, 1983.

Submitted this 4th day of May, 1983.

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing instrument was served on all interested parties on May 4, 1983.

Signed:
Herbert Boyland

Filed: May 6, 1983
U.S. District Court
Eastern District of Texas